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No. 99-77

IN THE

SUPREME COURT OF THE UNITED STATES

EXZAVIOUS LEE GIBSON,

Petitioner

v.

TONY G. TURPIN, WARDEN, GEORGIA DIAGNOSTIC AND CLASSIFICATION CENTER,

Respondent

On Petition For Writ Of Certiorari To The Supreme Court of Georgia

MOTION OF THE SOUTHERN CENTER FOR HUMAN RIGHTS TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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MOTION OF THE SOUTHERN CENTER FOR HUMAN RIGHTS FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The Southern Center for Human Rights (the "Center") respectfully moves for leave to file the accompanying brief as *amicus curiae* pursuant to Rule 37.2(b) of the Rules of this Court. Petitioner's consent to the filing of this brief has been filed with the Court. Respondent has refused consent.

INTEREST OF THE SOUTHERN CENTER FOR HUMAN RIGHTS

The Center is a non-profit, public interest legal program governed by a Board of Directors. Among its missions are promoting the creation, improvement and support of indigent defense programs; achieving equal justice for all, regardless of indigence or disadvantage; and ensuring that the criminal justice system operates consistently with the requirements of the Bill of Rights.

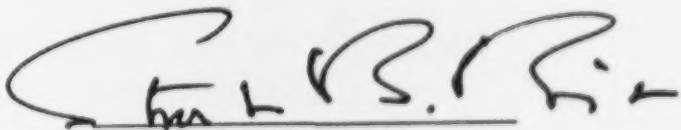
Based in Georgia, the Center has long been involved in efforts to provide counsel for indigent people facing the death penalty in post-conviction proceedings. Since its creation in 1976, lawyers employed by the Center have represented numerous individuals sentenced to death in post-conviction proceedings, recruited lawyers to provide *pro bono publico* representation to condemned people, and have provided instruction, materials and advice to lawyers who have come forward to provide such representation.

The Center has a strong interest in the fairness of state post-conviction proceedings. Due to its experience, the Center is in a unique position to inform this Court of the immense importance of the constititonal issue presented by this case.

CONCLUSION

For the above-stated reasons, the Center respectfully urges the Court to grant this motion for leave to file the attached brief as *amicus curiae* in the support of the position of the Petitioner.

Respectfully Submitted,



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BRIEF OF *AMICUS CURIAE* SOUTHERN CENTER FOR HUMAN RIGHTS IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Southern Center for Human Rights[1] seeks to realize the goal of equal justice for all and ensure that the criminal justice system operates consistently with the requirements of the Bill of Rights. Thus, it is vitally interested in whether petitioner Exzavious Gibson and others like him are provided counsel in state post-conviction proceedings.

Because of the Center's interest and its work in the last 24 years, it is in a position to assist this Court as *amicus curiae*. The Center has seen the problem of lack of lawyers for people sentenced to death in Georgia grow well beyond the crisis stage. The Center has repeatedly observed the difference that lawyers make in capital post-conviction proceedings in Georgia, where relief has been granted as to conviction or sentence for *over half* of the individuals who have completed post-conviction review.

While lawyers employed by the Center have and continue to handle a number of capital post-conviction cases, to recruit volunteer lawyers, and to assist lawyers they and the American Bar Association's Death Penalty Representation Project have recruited, there are far more

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1. Counsel for a party did not author this brief in whole or in part and no person or entity, other than *amicus curiae*, have made a monetary contribution to the preparation or submission of this brief. Petitioner has consented to the filing of this brief. Respondent has refused consent. A Motion for Leave to File Brief as *Amicus Curiae* is attached hereto as required by Rule 37.2(b) of the Rules of this Court.

death-sentenced individuals without counsel than lawyers willing to represent them. In this brief, the Center will provide this Court with its observations about the importance of counsel in post-conviction review in Georgia.

STATEMENT OF THE CASE

The state post-conviction hearing to determine the validity of the conviction and death sentence in the case of Exzavious Gibson, whose IQ has been measured in various tests to be between 76 and 82,[2] began as follows:

> The Court: Okay. Mr. Gibson, do you want to proceed?
>
> Gibson: I don't have an attorney.
>
> The Court: I understand that.
>
> Gibson: I am not waiving my rights.
>
> The Court: I understand that. Do you have any evidence you want to put up?
>
> Gibson: I don't know what to plead.
>
> The Court: Huh?
>
> Gibson: I don't know what to plead.
>
> The Court: I am not asking you to plead anything. I am just asking you if you have anything

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2. *Gibson v. Turpin*, 513 S.E.2d 186, 193 (Ga. 1999); *id.* at 193 (Fletcher, J., dissenting).

you want to put up, anything you want to introduce to this Court.

Gibson: But I don't have an attorney.[3]

Nevertheless, the court proceeded. After the Assistant Attorney General – who specializes in habeas corpus cases – presented the testimony of Gibson's trial attorney, Gibson was asked if he wanted to conduct cross-examination:

The Court: Mr. Gibson, would you like to ask Mr. Mullis any questions?

Gibson: I don't have any counsel.

The Court: I understand that, but I am asking, can you tell me yes or no whether you want to ask him any questions or not?

Gibson: I'm not my own counsel.

The Court: I'm sorry, sir, I didn't understand you.

Gibson: I'm not my own counsel.

The Court: I understand, but do you want, do you, individually, want to ask him anything?

Gibson: I don't know.

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3. *Gibson v. Turpin*, No. 95-V-648 (Super. Ct. of Butts Co., Ga., Transcript of Hearing of Sept. 12, 1996, at 2-3).

> The Court: Okay, sir. Okay, thank you, Mr. Mullis, you can go down.[4]

Gibson tendered no evidence, examined no witnesses and made no objections. The judge denied Gibson relief. The Georgia Supreme Court, divided 4-3, refused to issue a certificate of probable cause to review the case. *Gibson v. Turpin*, 513 S.E.2d 186 (Ga. 1999).

This case squarely presents the question of whether the Constitution allows a state to deny Exzavious Gibson and others like him any process at all and extinguish their lives simply because they are too poor to retain an attorney.

In *Murray v. Giarratano*, 492 U.S. 1 (1989), this Court narrowly held, 5-4, that the Constitution does not require, even in capital cases, that the states provide counsel to the poor in state post-conviction proceedings. However, the death-sentenced inmate, Joseph Giarratano, was represented by counsel in that case. Justice Kennedy, a member of the majority, wrote that his vote rested in part on the fact that Virginia provided by statute for the appointment of counsel in state post-conviction proceedings, and that no death-sentenced inmate in Virginia at that time had been without legal assistance in state post-conviction proceedings. *Id.* at 14.

Georgia has no such statute. Gibson, unlike Giarratano, has limited intellectual functioning. He is only one of many death-sentenced individuals who may be forced to fend for themselves in state post-conviction proceedings that determine whether they live or die.

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4. *Id.* at 67.

SUMMARY OF ARGUMENT

Whether Georgia is free to ignore Exzavious Gibson's indigence, his mental limitations and the realities of his confinement on its death row, and extinguish his life based on the sham hearing that occurred below is a question of immense importance. It is a question that undoubtedly concerns every member of this Court, and should concern every person who takes seriously the goal of "equal justice under law" inscribed on this Court's building.

The assistance of counsel has been indispensable to the fairness and reliability of post-conviction proceedings in Georgia. As a result of representation provided by volunteer counsel, the innocent have been freed and new trials have been granted to those convicted and sentenced to death in violation of the Constitution. The many who were once condemned to die and are now free or no longer under sentence of death are living proof that lawyers are necessities, not luxuries, in state post-conviction review in Georgia.

In many cases, post-conviction counsel have made the demanding showing that the condemned were denied effective counsel, a showing that a semi-literate or mentally ill lay person could never make on his own. Many other cases in which relief has been granted have involved individuals who, like Gibson, were mentally retarded or mentally impaired and incapable of representing themselves.

While the stakes – life or death – are as high as ever, much has changed since *Giarratano*. Federal and state habeas law has become significantly more complex in the last decade. The process moves faster, as it did in Mr. Gibson's case. It has become virtually impossible for those

with limited education, limited mental ability and limited access to law books to master the law, conduct investigations, and comply with the complex rules governing post-conviction review. The question presented by this case is so fundamental to basic notions of due process and equal protection that this Court should grant certiorari to review the decision below.

ARGUMENT

LAWYERS HAVE BEEN INDISPENSABLE IN ESTABLISHING WRONGFUL AND UNCONSTITUTIONAL CONVICTIONS OR DEATH SENTENCES IN *OVER HALF* THE GEORGIA CAPITAL CASES REVIEWED IN STATE AND FEDERAL HABEAS CORPUS.

The need for the assistance of counsel in post-conviction proceedings in Georgia is most compellingly demonstrated by the people once condemned to die who are alive today because lawyers who represented them in state and federal habeas corpus proceedings showed that they were convicted or sentenced in violation of the Constitution.

Since this Court upheld Georgia's death penalty scheme in *Gregg v. Georgia*, 428 U.S. 153 (1976), post-conviction counsel have been responsible for seeing that three innocent people who had been sentenced to death were not wrongfully executed. Lawyers representing death-sentenced inmates in post-conviction proceedings have also proven constitutional error, requiring new trials or new sentencing hearings, in *over half* of the Georgia

cases in which post-conviction review has been completed.[5]

The remarkable rate at which post-conviction relief has been granted in Georgia capital cases makes it clear that harmful constitutional error is often not remedied on direct appeal. A survey of Georgia's capital cases since 1976 conducted by *amicus* reveals that courts have granted post-conviction relief in 113 of the 221 cases in which the Georgia Supreme Court affirmed death penalties and post-conviction proceedings have been completed.[6] State courts have granted relief in 26 percent – 44 of 171 – of cases completed, and federal courts have granted relief in 65 percent – 69 of 104 – of cases in which habeas review has been completed.[7] Even in those cases where relief has been granted in the federal courts, it has almost always been based on records established during state post-conviction proceedings.

It is doubtful that the harmful errors in any of these cases would have been detected and proven in the absence of counsel. As Mississippi's highest court recognized recently:

> [T]he reality [is] that indigent death row inmates are simply not able, on their own, to competently engage in this type of litigation. Applications for post-conviction relief often raise issues which require investigation, analysis and presentation of facts outside the appellate record. The inmate is confined, unable to investigate, and often without

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5. *See* Appendix to this brief, listing cases.

6. *Id.*

7. *Id.*

> training in the law or the mental ability to comprehend the requirements of [state habeas law]. The inmate is in effect denied meaningful access to the courts by lack of funds for this state-provided remedy.[8]

We review here only a few of the many Georgia capital cases in which the assistance of counsel in state post-conviction proceedings was essential to a just result.

A. Innocent People Sentenced to Death

As a result of the work done by volunteer counsel, Gary Nelson was released after spending 11 years on Georgia's death row for a crime he did not commit. Nelson's volunteer lawyers discovered that a hair found on the victim's body, which a prosecution expert had linked to Nelson, lacked sufficient characteristics for microscopic comparison.[9] They also found that the Federal Bureau of Investigation had previously examined the hair and found that it could not validly be compared.[10] The Georgia Supreme Court granted habeas relief and Nelson was released.[11]

Nelson, like many people condemned to die in Georgia, received only perfunctory representation from a court-appointed lawyer at his trial. The appointed lawyer,

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8. *Jackson v. State*, __ So.2d __, 1999 WL 33904, at *3 (Miss. 1999).

9. *David Lundy, Bondurant's Costly Death Appeal*, FULTON COUNTY DAILY REP., Aug. 18, 1989, at 6.

10. *Nelson v. Zant*, 405 S.E.2d 250, 252 (Ga. 1991).

11. *Id.*

who was struggling with financial problems and a divorce, was paid at a rate of only $15 to $20 per hour.[12] His request for co-counsel was denied.[13] Even though the case against Nelson was entirely circumstantial and based on the questionable opinion of a prosecution expert linking the hair to Nelson,[14] the appointed lawyer was not provided funds for an investigator and, knowing a request would be denied, he did not seek funds for an expert.[15] Counsel, whose closing argument was only 255 words long, was later disbarred for other reasons.[16]

Jerry Banks was twice been sentenced to death[17] and the lawyer who defended him at trial abandoned him after being disbarred[18] before three volunteer lawyers obtained his release by showing that law enforcement officials had tampered with evidence and failed to reveal exculpatory evidence proving Banks' innocence.[19] Robert Wallace was acquitted at a retrial after being represented by counsel in

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12. Lundy, *supra* note 9, at 6; *see also* Affidavit of Howard A. McGlasson, Jr., at 6, 8, admitted in *Nelson v. Zant* (Super. Ct. Butts County, Ga. 1989) (No. 5387), *rev'd*, 405 S.E.2d 250 (Ga. 1991).

13. *Id.*

14. *Id.* at 6, 15.

15. *Id.* at 7-8.

16. *Lundy, supra* note 9, at 6.

17. *Banks v. State*, 235 Ga. 121, 218 S.E.2d 851 (1975); *Banks v. State*, 246 Ga. 1, 268 S.E.2d 630 (1980).

18. Michael L. Radelet et al., IN SPITE OF INNOCENCE 181 (1992).

19. *Id.* at 182-85.

state and federal post-conviction proceedings and obtaining relief.[20]

B. Denial of The Right to Counsel

In rejecting Joseph Giarratano's claim that he was entitled to counsel in state habeas corpus proceedings, this Court said:

> Virginia may quite sensibly decide to concentrate the resources it devotes to providing attorneys to capital defendants at the trial and appellate stages of a capital proceeding. Capable lawyering there would mean fewer colorable claims of ineffective assistance of counsel to be litigated in collateral attack.[21]

Georgia has not concentrated resources at the trial or appellate stages of capital cases. Colorable claims of ineffective assistance of counsel in capital cases have been legion, and 24 death sentences have been vacated due to ineffective representation at trial.[22] The poor quality of legal representation provided by court-appointed lawyers in Georgia was described as follows by an American Bar Association report:

> Georgia's recent experience with capital punishment has been marred by examples of inadequate representation ranging from virtually no

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20. *State v. Wallace*, No. 10387 (Super. Ct. Greene County, Ga.); *Wallace v. Kemp*, 757 F.2d 1102 (11th Cir. 1985).

21. *Murray v. Giarratano*, 492 U.S. 1, 11 (1989).

22. *See* Appendix at 1a-5a. The 24 cases are indicated "IAC" and citations are provided.

> representation at all by counsel, to representation by inexperienced counsel, to failures to investigate basic threshold questions, to lack of knowledge of governing law, to lack of advocacy on the issue of guilt, to failure to present a case for life at the penalty phase.[23]

In the ten years since this Court decided *Giarratano* and the ABA issued its report, the quality of counsel in death penalty cases in Georgia has not improved. Within the last year, three people were granted relief in state post-conviction proceedings and two in federal habeas corpus after lawyers demonstrated that they were condemned to die at trials at which they had been denied effective counsel.

William Lipham's death sentence was vacated because his court-appointed lawyer "totally failed to read, review or interpret" records regarding Lipham's mental health and history of institutionalization, failed to have a mental health expert examine the records and, instead, just introduced "2500 pages of raw institutional documents" into evidence, and then urged the jury, "without any guidance, to read through the stack of papers for mitigation evidence."[24] In affirming the grant of habeas relief, the Georgia Supreme Court relied on the record developed by "Lipham's habeas counsel [who] presented the affidavits of several psychologists and psychiatrists who testified that test results contained within the institutional

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23. American Bar Association, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 65-66 (1990).

24. *Turpin v. Lipham*, 510 S.E.2d 32, 40, 41 (Ga. 1998).

records . . . suggest organic brain damage . . . and post traumatic stress disorder."[25]

The Georgia Supreme Court affirmed habeas corpus relief for Scott Christenson after it was shown that his court-appointed attorneys failed to investigate his "extensive history of psychiatric problems and substance abuse" and "poorly prepared" witnesses to testify in mitigation.[26] Based upon the testimony of two mental health experts presented by Christenson's volunteer post-conviction counsel, the Georgia Supreme Court concluded that "[p]sychiatric evidence may have provided the jury with an explanation for Christenson's actions" and that counsel was unconstitutionally ineffective.[27]

The evidence of mental problems presented by habeas counsel for both Lipham and Christenson is not only a basis for relief; it demonstrates that neither was capable of representing himself in state post-conviction proceedings.

Dennis Hall, an alcoholic who shot his son while intoxicated, was equally incapable of representing himself. Both his conviction and death sentence were vacated by a state habeas corpus court last year after volunteer counsel demonstrated that Hall's lawyer spent less than six hours interviewing defense witnesses in the five months prior to trial, made no investigation of his client's history of alcoholism, consulted no experts, interviewed only two of

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25. *Id.* at 41.

26. *Turpin v. Christenson*, 497 S.E.2d 216, 224, 226 (Ga. 1998).

27. *Id.* at 225, 229.

the 25 witnesses the state intended to call, and failed to object to inadmissible evidence.[28]

These cases, as well as two in which the federal courts have granted relief due to ineffective representation at Georgia capital trials,[29] are only the most recent examples of breakdowns in Georgia's adversary system.

Like Exzavious Gibson, James Pitts was a person of limited intellectual functioning. Although Georgia law prohibits the execution of the mentally retarded[30] and Pitts' court-appointed counsel had the results of examinations by two mental health experts which showed that Pitts had an IQ of 70 and was mentally retarded, counsel failed to present this evidence because they erroneously believed they could not take advantage of a "guilty but mentally retarded" defense because Pitts' IQ was not below 55.[31] Post-conviction counsel obtained habeas corpus relief for Pitts by presenting evidence of his mental limitations and the deficient performance of the lawyers.

Two African-Americans condemned to death at trials at which they were represented by the elderly Imperial Wizard of the Georgia Ku Klux Klan were granted new

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28. *Hall v. Turpin*, No. 95-V-651 (Super. Ct. of Butts County, Ga., Order of Oct. 8, 1998, at 4-6, 24-36).

29. *Collier v. Turpin*, 177 F.3d. 1184 (11th Cir. 1999); *Dobbs v. Turpin*, 142 F.3d 1383 (11th Cir. 1998).

30. Off. Code Ga. Ann. § 17-7-131 (1998).

31. *Zant v. Pitts*, 436 S.E.2d 4, 5 (Ga. 1993).

trials in state post-conviction proceedings.[32] In the case of Eddie Lee Ross, a seriously mentally-ill man, the Imperial Wizard argued that Ross did not commit the crime while another lawyer appointed to defend Ross presented a mental health defense that acknowledged Ross's participation in the crime.[33] In the case of Aden Harrison, the Wizard slept through parts of the trial.[34]

In another case, a court-appointed lawyer failed to raise a meritorious issue because he was unaware of the law and referred to his client as a "nigger" in closing argument.[35] Another ineffective lawyer had been a member of the bar for only six months prior to his appointment to defend a capital case.[36] Another conceded guilt in closing argument at the guilt phase.[37] One lawyer was not even present during portions of the trial, and cross-examined one witness whose direct examination he had missed because he was parking his

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32. *Ross v. Kemp*, 393 S.E.2d 244 (Ga. 1990); *Harrison v. Zant*, No. 88-V-1640 (Super. Ct. of Butts County, Ga., Order of Oct. 5, 1990), *aff'd*, 402 S.E.2d 581 (Ga. 1991).

33. *Ross v. Kemp*, 393 S.E.2d at 245.

34. *Harrison v. Zant*, No. 88-V-1640, (Super. Ct. of Butts County, Ga., Order of Oct. 5, 1990 at 2), *aff'd*, 402 S.E.2d 581 (Ga. 1991).

35. *Goodwin v. Balkcom*, 684 F.2d 794, 817-20 (11th Cir. 1982), *cert. denied*, 460 U.S. 1098 (1983).

36. *Tyler v. Kemp*, 755 F.2d 741 (11th Cir. 1985), *cert. denied*, 474 U.S. 1026 (1985).

37. *Francis v. Spraggins*, 720 F.2d 1190 (11th Cir. 1983).

car.[38] Habeas relief was granted in another case where the lawyer failed to provide "even a modicum of professional assistance at any time" during the trial.[39] Numerous cases have been reversed because counsel failed to present any evidence in mitigation.[40]

Thus, it is clear that Georgia has not concentrated its resources in providing competent counsel at trial in order to avoid colorable claims of ineffective assistance, as suggested by the plurality in *Giarratano*.[41] Indeed, even in many cases in which courts found lawyers not to fall below the highly deferential standard of *Strickland v. Washington*[42] and executions were carried out, lawyers for death-sentenced inmates presented colorable claims of ineffective assistance.

For example, James Messer was executed following a trial at which his lawyer presented no opening statement, no defense case, conducted cursory cross-examination,

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38. *House v. Balkcom*, 725 F.2d 608 (11th Cir. 1984), *cert. denied*, 469 U.S. 870 (1984).

39. *Young v. Zant*, 677 F.2d 792, 795 (11th Cir. 1982).

40. *See, e.g., Dobbs v. Turpin*, 142 F.3d 1383 (11th Cir. 1998); *Baxter v. Thomas*, 43 F.3d 1501 (11th Cir. 1995), *cert. denied*, 516 U.S. 946 (1995); *Cunningham v. Zant*, 928 F.2d 1006 (11th Cir. 1991); *Horton v. Zant*, 941 F.2d 1449 (11th Cir. 1991), *cert. denied*, 503 U.S. 952 (1992); *Thomas v. Kemp*, 796 F.2d 1322, 1324-25 (11th Cir. 1986), *cert. denied*, 479 U.S. 996 (1986); *Blake v. Kemp*, 758 F.2d 523 (11th Cir. 1985), *cert. denied*, 474 U.S. 998 (1985); *Johnson v. Kemp*, 615 F. Supp. 355, 364 (S.D. Ga. 1985), *aff'd without opinion*, 781 F.2d 1483 (11th Cir. 1986); *Zant v. Hamilton*, 307 S.E.2d 667 (Ga. 1983).

41. *Giarratano*, 492 U.S. at 11.

42. 466 U.S. 668, 689 (1984).

made no objections, emphasized the horror of the crime in a brief closing at the guilt phase and presented a wholly inadequate mitigation case.[43] William Mitchell was executed even though his attorney made no attempt to contact any mitigating witnesses, made no inquiries into his client's academic, medical, or psychological history, and thus failed to present any case in mitigation.[44] John Young was executed even though his lawyer's performance at trial suffered because the lawyer was dependent on amphetamines and other drugs, physically exhausted, and distracted by marital problems, child custody arrangements, difficulties in a relationship with a lover, and the pressures of a family business.[45] Soon after Young's trial, his lawyer plead guilty to state and federal drug charges and joined Young at the county jail.[46]

Even though Messer, Mitchell and Young were ultimately unsuccessful in overcoming the immense burden that *Strickland* places on a poor person who has the misfortune of being assigned an inept lawyer, they presented substantial, colorable claims that their legal representation fell below constitutional standards. They were entitled to present their substantial claims of denial

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43. *Messer v. Kemp*, 760 F.2d 1080, 1093-97 (11th Cir. 1985) (Johnson, J., dissenting), *cert. denied*, 474 U.S. 1088 (1986); *Messer v. Kemp*, 474 U.S. 1088, 1089-90 (1986) (Marshall, J., dissenting from denial of certiorari).

44. *Mitchell v. Kemp*, 483 U.S. 1026 (1987) (Marshall, J., dissenting from denial of certiorari).

45. Affidavit of Charles Marchman, Jr. at 1-5, *Young v. Kemp*, No. 85-98-2-MAC (M.D. Ga. 1985).

46. *Id.* at 7.

of the most fundamental right, but they could do so only with the assistance of post-conviction counsel.

It is inconceivable that any of the many people who have been granted relief because of ineffective assistance of counsel could have represented themselves and shown deficient and prejudicial performance by counsel, as required by *Strickland*. It was only after capable volunteer lawyers investigated the cases and presented evidence of the ineffectiveness of trial counsel that they were granted new trials or sentencing. Remarkably, not a single person discussed in this section who was granted relief because of ineffective assistance of counsel is under death sentence today.[47] Competent counsel does make a difference both at trial and in post-conviction proceedings.

It is equally inconceivable that Exzavious Gibson, with limited intellectual functioning and confined to a cell on death row, could have prevailed on his claim of ineffective assistance of counsel in the sham hearing that occurred in the Superior Court below.

C. The Mentally Retarded

Just as it is unlikely that those deprived of their Sixth Amendment right to counsel at trial could, if left to fend for themselves, establish the constitutional violation in post-conviction proceedings, it is similarly improbable that a mentally retarded person – a person like Exzavious Gibson, whose IQ has been found to be between 76 and 82 – could prove his own mental retardation in state habeas corpus proceedings.

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47. NAACP Legal Defense & Educational Fund, *Death Row USA*, at 29-30 (April 1, 1999) (listing those under death sentence in Georgia).

Georgia law has prohibited the execution of the mentally retarded since 1988.[48] The Georgia Supreme Court held in 1989 that execution of the mentally retarded violated the Georgia Constitution and provided that those sentenced to death prior to the statute's enactment were entitled to a hearing and could not be put to death if found mentally retarded.[49]

Since 1989, 24 cases have been remanded from the state habeas court to courts of conviction for hearings on whether the condemned inmate was mentally retarded.[50] In all of those cases, lawyers presented evidence of the limited intellectual functioning of the condemned individual. Left to proceed *pro se*, these mentally limited people would be wholly incapable of presenting their claims and helpless to present evidence. They would surely be denied relief and executed even though Georgia law prevents their execution.

D. Other Constitutional Violations

It stretches credulity to think that Robert Strickland, suffering from a "psychotic disorder," with an IQ of 73 and "unaware of the proceedings against him and totally unable to communicate on matters relating to the crime or pending trial," could have demonstrated in post-conviction proceedings that he was mentally incompetent at the time

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48. Off. Code Ga. Ann. § 17-7-131 (1988).

49. *Fleming v. Zant*, 286 S.E.2d 339 (Ga. 1989).

50. The cases are listed in the Appendix to this Brief at 1-2. The 24 cases are indicated "MR Remand" and citations are provided.

of his capital trial.[51] Or that Tony Amadeo, condemned to die at age 18, could have presented in state habeas proceedings, as did his lawyers, a handwritten memorandum from the prosecutor advising jury commissioners to underrepresent blacks and women in the jury lists.[52] Or that Michael Berryhill could have presented evidence of the underrepresentation of women in the pool from which his jury was selected.[53]

Amadeo, Berryhill, Strickland and many others whose constitutional rights were vindicated in habeas corpus proceedings were not resentenced to death. Their cases are representative of the many, set out in the Appendix to this brief, that have been marred by at least one harmful violation of the United States Constitution, where relief was available only in post-conviction proceedings. In each, it is highly unlikely that any relief would have been granted had the petitioner been left on his or her own to recognize the legal claims, to develop and present evidence supporting them, and to navigate the complex and stormy waters of habeas corpus law to get a ruling on the merits.

Justice Kennedy observed in *Giarratano* that this Court has given the states "wide discretion" in deciding how to provide access to the courts for the poor.[54] Some states – including Georgia – have proven unworthy of the trust placed in them by this Court. Over 15 years ago a

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51. *Strickland v. Frances*, 738 F.2d 1542, 1544-56, 1548 (11th Cir. 1984).

52. *Amadeo v. Zant*, 486 U.S. 214 (1988).

53. *Berryhill v. Zant*, 858 F.2d 633 (11th Cir. 1988).

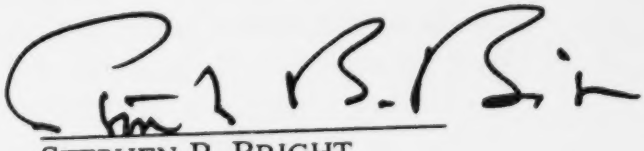
54. 492 U.S. at 14 (Kennedy, J., concurring), quoting *Bounds v. Smith*, 430 U.S. 817, 833 (1977).

petitioner condemned to die in Georgia was unable to present testimony at his state habeas hearing because Georgia did not even provide for payment of witness fees of $10.[55] Georgia does no better today. Its state post-conviction proceedings are available only to those with money or those fortunate enough to receive *pro bono* legal assistance. Others, like Gibson, may, simply as a result of their poverty, be denied post-conviction review and be executed even if convicted and sentenced to death in violation of the Constitution.

CONCLUSION

This nation prides itself in its commitment to due process and equal justice under law. This Court should grant certiorari to determine whether those fundamental principles do not at least require that a bewildered, mentally limited man be given a fair chance to find a *pro bono* lawyer before being forced into a hearing which may determine whether he lives or dies.

Respectfully Submitted,



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55. *Thomas v. Zant*, 697 F.2d 977, 988 n.14 (11th Cir. 1983).

APPENDIX

STATE HABEAS CORPUS RELIEF GRANTED
PERSONS SENTENCED TO DEATH
IN GEORGIA SINCE 1973
(cases that have been finally resolved)

Total individuals granted relief: 43

Number granted relief based on finding of ineffective assistance of counsel: 8
[designated "IAC" in listing below]

Number remanded for determination of whether condemned inmate was mentally retarded: 24
[designated "MR Remand" in listing below]
[*see Flemming v. Zant*, 386 S.E.2d 339 (Ga. 1989)]

Allen, S. (2nd), Butts County Super. Ct. No. 90-V-3326 (MR Remand)
Beck, 386 S.E.2d 349 (Ga. 1989) (MR Remand)
Birt, Butts Super. Ct. No. 78-74 (IAC)
Childs, Butts Super. Ct. No. 88-V-1405 (MR Remand)
Christenson, 497 S.E.2d 216 (Ga. 1998) (IAC)
Cohen, Butts Super. Ct. No. 89-V-2347 (MR Remand)
Collins, Butts Super. Ct. No. 90-V-3211 (MR Remand)
Cury, 371 S.E.2d 647 (Ga. 1988) (IAC)
Dampier, Butts Super. Ct. No. 5617
Davis, G., Butts Super. Ct. No. 86-V-855 (MR Remand)
Finney (2d), Butts Super. Ct. No. 86-V-597 (MR Remand)
Flemming (2d), 386 S.E.2d 339 (Ga. 1989) (MR Remand)
Floyd, 311 S.E.2d 828 (Ga. 1984)
Foster, Butts Super. Ct. No. 89-V-2275 (MR Remand)
Gaddis, 279 S.E.2d 219 (Ga. 1981)
Gates, 89-V-2468 (MR Remand)
Hamilton, 307 S.E.2d 667 (Ga. 1983) (IAC)
Harris, 253 S.E.2d 707 (Ga. 1979)
Harrison, 402 S.E.2d 518 (Ga. 1991) (IAC)
Hill, T., 301 S.E.2d 269 (IAC)
Holiday, Butts Super. Ct. No. 89-V-2021 (MR Remand)
Jarrell (1st), 284 S.E.2d 17 (Ga. 1981)
Jarrells, Butts Super. Ct. No. 90-V-3277 (MR Remand)
Krier, DeKalb Super. Ct. No. 83-2501

Lee, Jesse, Butts Super. Ct. No. 90-V-2616 (MR Remand)
Legare (1st), 455 U.S. 914 (1982)
Lipham, 510 S.E.2d 32 (Ga. 1998) (IAC)
Miller, Butts Super. Ct. No. 94-V-81 (MR Remand)
Morrison, Butts Super. Ct. No. 89-V-2309 (MR Remand)
Nelson, 405 S.E.2d 250 (Ga. 1991)
Pattillo, 417 S.E.2d 139 (Ga. 1992) (MR Remand)
Peek, Butts Super. Ct. No. 86-V-830 (MR Remand)
Pitts, 436 S.E.2d 4 (Ga. 1993) (IAC) (MR Remand)
Pruitt, M.A., Butts Super. Ct. No. 92-V-205 (MR Remand)
Pryor, Butts Super. Ct. No. 3826
Pulliam, Butts Super. Ct. No. 77-358
Redd (2d), Butts Super. Ct. No. S90-H0030 (MR Remand)
Rogers (2d), Butts Super. Ct. No. 94-V-661 (MR Remand)
Ross, E., 393 S.E.2d 244 (Ga. 1990) (IAC)
Spencer (2d), Butts Super. Ct. No. 91-V-4040 (MR Remand)
Todd, __ S.E.2d __, S99A0431, S99X0449 (Ga. July 14, 1999)
Walker, R., Butts Super. Ct. No. 90-V-2984 (MR Remand)
Wilson, W., Butts Super. Ct. No. 90-V-2935 (MR Remand)

STATE HABEAS RELIEF DENIED PERSONS SENTENCED TO DEATH IN GEORGIA SINCE 1973

(cases finally resolved in state court)

Total: 128

69 are listed under "Individuals sentenced to death in Georgia who have received federal habeas corpus relief since 1973," which follows.

35 are listed under "Individuals sentenced to death in Georgia who have been denied federal habeas corpus relief since 1973," which follows.

The cases of the remaining 24 individuals are still pending in federal review.

FEDERAL HABEAS CORPUS RELIEF GRANTED PERSONS SENTENCED TO DEATH IN GEORGIA SINCE 1973
(cases finally resolved)

Total: 69

Number granted relief based on finding of ineffective assistance of counsel: 16
[designated "IAC" in listing below]

Alderman (1st), 695 F.2d 124 (5th Cir. Unit B 1983)
Amadeo, 486 U.S. 214 (1988)
Baker, No. C82-2299A (N.D. Ga. 1984) (unpublished)
Baxter, 45 F.3d 1501 (11th Cir. 1995) (IAC)
Berryhill (1st), 640 F.2d 382 (5th Cir. 1981)
Berryhill (2d), 858 F.2d 633 (11th Cir. 1988)
Blake, 758 F.2d 523 (11th Cir. 1985) (IAC)
Blanks, No. CV-290-186 (S.D. Ga. 1991) (unpublished)
Bowen (2d), 832 F.2d 546 (11th Cir. 1987)
Brooks, 762 F.2d 1383 (11th Cir. 1985) (en banc), 809 F.2d 700 (1987) (en banc)
Brown, J.W. (1st), No. 88-CV-228-RCF (N.D. Ga. 1988) (unpublished)
Brown, N., No. CV-188-027 (S.D. Ga. 1989) (unpublished)
Burden, 24 F.3d 1298 (11th Cir. 1994) (attorney conflict of interest)
Buttrum, J., 721 F. Supp. 1268 (N.D. Ga. 1989)
Cervi, 855 F.2d 702 (11th Cir. 1988)
Coleman, W., 778 F.2d 1487 (11th Cir. 1986)
Collier, 177 F.3d 1184 (11th Cir. 1999) (IAC)
Corn, 837 F.2d 1474 (11th Cir. 1988)
Cunningham, J., 928 F.2d 1006 (11th Cir. 1991) (IAC)
Davis, C. (2d), 752 F.2d 1515 (11th Cir. 1985)
Davis, F. (2d), 829 F.2d 1522 (11th Cir. 1987) (IAC)
Davis, J.M., 36 F.3d 1538 (11th Cir. 1994)
Dick, 833 F.2d 1448 (11th Cir. 1987)
Dix, 763 F.2d 1207 (11th Cir. 1985)
Dobbs, 142 F.3d 1383 (11th Cir. 1998) (IAC)
Douthit, No. C81-2310A (N.D. Ga. 1984) (unpublished)
Drake, 762 F.2d 1449 (11th Cir. 1985) (en banc)

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Wallace, 757 F.2d 1102 (11th Cir. 1985)
Westbrook (1st), 743 F.2d 764 (11th Cir. 1984) (IAC)
Williams, A., 87 F.3d 1204 (11th Cir. 1996) (IAC)
Wilson, J., 777 F.2d 621 (11th Cir. 1985)
Young, C., 677 F.2d 792 (11th Cir. 1982) (IAC)

FEDERAL HABEAS CORPUS RELIEF DENIED
PERSONS SENTENCED TO DEATH
IN GEORGIA SINCE 1973
(cases finally resolved)

Total: 35
Number executed: 23

Alderman (2d), 22 F.3d 1541 (11th Cir. 1994)
Bowden, 733 F.2d 740 (11th Cir. 1984); 767 F.2d 761 (11th Cir. 1985); 774 F.2d 1494 (11th Cir. 1988) (executed)
Burger, 483 U.S. 776 (1987); 984 F.2d 1129 (11th Cir. 1993) (executed)
Cape, 741 F.2d 1287 (11th Cir. 1984)
Cargill, 120 F.3d 1366 (11th Cir. 1997) (executed)
Chenault, 581 F.2d 444 (5th Cir. 1978)
Collins, 728 F.2d 1322 (11th Cir. 1984); 892 F.2d 1505 (11th Cir. 1990)
Devier, 3 F.3d 1445 (11th Cir. 1993) (executed)
Felker, 52 F.3d 907 (11th Cir. 1995); 518 U.S. 651 (1996) (executed)
Flemming, 748 F.2d 1435 (11th Cir. 1984); 837 F.2d 940 (11th Cir. 1989)
Gates, 863 F.2d 1492 (11th Cir. 1989)
Green (2d), 738 F.2d 1529 (11th Cir. 1984) (executed)
Hance (2d), 981 F.2d 1180 (11th Cir. 1993) (executed)
High, 916 F.2d 1507 (11th Cir. 1990)
Ingram, 26 F.3d 1047 (11th Cir. 1994) (executed)
Lonchar, 978 F.2d 637 (11th Cir. 1992); 58 F.3d 590 (11th Cir. 1995) (executed)
McClesky, 499 U.S. 467 (1991); 481 U.S. 279 (1987) (executed)
McCorquodale, 721 F.2d 1493 (11th Cir. 1983) (executed)

Messer, 760 F.2d 1080 (Cir. 1985); 831 F.2d 946 (11th Cir. 1987) (executed)
Mitchell, 762 F.2d 886 (11th Cir. 1985); 827 F.2d 1433 (11th Cir. 1987) (executed)
Moore, W. N., 716 F.2d 1511 (11th Cir. 1983); 885 F.2d 1497 (11th Cir. 1989)
Mulligan, 771 F.2d 1436 (11th Cir. 1985); 818 F.2d 746 (11th Cir. 1987) (executed)
Peek, 784 F.2d 1479 (11th Cir. 1986) (en banc)
Rogers, 13 F.3d 384 (11th Cir. 1994)
Smith, J.E., 660 F.2d 573 (5th Cir. 1981); 671 F.2d 858 (5th Cir. Unit B 1982); 715 F.2d 1459 (11th Cir. 1983) (executed)
Solomon, 735 F.2d 395 (11th Cir. 1984); 888 F.2d 1579 (1989) (executed)
Stanley, 697 F.2d 955 (11th Cir. 1983); 737 F.2d 921 (11th Cir. 1984) (executed)
Stephens, A., 462 U.S. 862 (1983); 716 F.2d 276 (5th Cir. Unit B 1983); 722 F.2d 628 (11th Cir. 1983) (executed)
Stevens, T., 968 F.2d 1076 (11th Cir. 1992) (executed)
Tucker, R., 762 F.2d 1496 (11th Cir. 1985) (en banc); 776 F.2d 1487 (11th Cir. 1985); 818 F.2d 749 (11th Cir. 1987) (executed)
Tucker, W., 802 F.2d 1293 (11th Cir. 1986) (en banc); 819 F.2d 978 (11th Cir. 1987) (executed)
Waters, 46 F.3d 1506 (11th Cir. 1995) (en banc)
Williams, G., 846 F.2d 1276 (11th Cir. 1988)
Willis, 838 F.2d 1510 (11th Cir. 1988) (executed)
Young, J., 727 F.2d 1489 (11th Cir. 1984); 758 F.2d 514 (11th Cir. 1985) (executed)

INDIVIDUALS UNDER SENTENCE OF DEATH IN GEORGIA WITH CASES PENDING IN STATE OR FEDERAL COURTS WITHOUT FINAL RESOLUTION

Total: 73
(not listed)